



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTION AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW DIVISION CAUSE NO. 23 OF 2016

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO FILE JUDICIAL REVIEW
PROCEEDINGS FROM AN ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: THE LANDLORD AND TENANT ACT (SHOPS, HOTEL AND CATERING
ESTABLISHMENTS) CAP 301

IN THE MATTER OF: THE BUSINESS PREMISES RENT TRIBUNAL CASE NO. 18 OF 2016
KHALIF JELE MOHAMED

SALAT W. HUSSEIN **VERSUS** ABDULKADIR HUBESS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE CHAIRMAN BUSINESS

PREMISES RENT TRIBUNAL.....RESPONDENT

AND

1. KHALIF JELE MOHAMED

2. SALAT W. HUSSEIN.....INTERESTED PARTIES

EX PARTE: ABDULKADIR HUBESS

RULING OF THE COURT

1. By the Notice of Motion dated 9th March, 2017 filed under Order 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules, the Interested Parties/Applicants seek the following orders:

a) **THAT** this Honourable Court be pleased to stay the execution of the Ruling delivered on 23rd day of February, 2017 in Judicial Review No. 23 of 2016 pending the hearing and determination of this Appeal.

b) **THAT** costs of this application to await the outcome of the appeal.

The application is supported by the affidavit of **KHALIF JELE MOHAMED** sworn on 9th March, 2017.

2. The Applicants allege that a ruling was delivered by Hon. Lady Justice Njoki Mwangi in this matter on 23rd February, 2017 and that they were displeased with the outcome of the Ruling and thus have filed an appeal to the Court of Appeal vide a Notice of Appeal dated 8th March, 2017 (a copy of the Notice of Appeal is annexed to the **KHALIF JELE MOHAMED'S** affidavit and marked as "KJM-2"). The Applicants allege that the matter before the Hon. Lady Justice Njoki Mwangi was a Judicial Review following orders issued by the Business Premises Rent Tribunal stopping the ex-parte Applicant/Respondent from effecting the intention to evict the Interested Parties/Applicants from their business premises without due process.

3. The Applicants further allege that it is imperative that this court grants the orders sought as before filing the Business Premises Rent Tribunal Case No. 18 of 2016 the ex-parte Applicant/Respondent herein had already threatened the Applicants with an eviction vide a letter dated 29th October, 2015 thus if the orders sought are not granted it is highly probable that the ex-parte Applicant/Respondent will actualize the threats(a copy of the Notice of Appeal is annexed to the **KHALIF JELE MOHAMED'S** affidavit and marked as "KJM-3").

4. The Applicants allege that before the ruling dated 23rd February, 2017, the Applicants were protected by the orders of the aforementioned Tribunal and now that the Ruling dated 23rd February, 2017 was against them they are now at the mercy of the ax-parte Applicant/Respondent. Further, the Applicants allege that they have continuously paid their rents on time and that their payments are up to date and that the dispute between themselves and the ex-parte Applicant/Respondent is not due to non-payment of rent but malice.

5. The Applicants allege that their appeal is arguable and has high chances of success and that there is no order in place to deter the ex-parte Applicant/Respondent from evicting the Applicants.

6. The Applicant's case is that if the orders sought are not granted their appeal will be rendered nugatory and they will suffer substantial loss and thus pray that the orders sought be granted as prayed.

Response

7. The ex-parte Applicant/Respondent herein responded to the application by way of Grounds of Oppositions filed on 21st March, 2017 wherein he alleged that:

a) The application is misconceived and bad in law.

b) No order of stay can be granted under the provisions of Section 8 of the Law Reform Act, Cap 8, Laws of Kenya.

c) There is no imminent threat of execution as the ex-parte applicant/respondent will have to file proceedings for vacant possession.

Hearing

8. When the application came up for hearing on 3rd April, 2017, the parties agreed to canvass the application by way of written submissions.

Submissions

9. The ex-parte Applicant/Respondent filed his written submissions on 11th April, 2017 while the Interested Parties/Applicants herein filed their written submissions on 22nd May, 2017. Mr. Khatib, counsel for the ex-parte Applicant/Respondent submitted that the issue for determination by this Court is **“whether this Court has the jurisdiction to grant an injunction or stay of execution emanating from a ruling under Judicial Review Proceedings”**. Counsel submitted that this court does not have the jurisdiction to grant an injunction or stay of execution as this application was based on a Judicial Review Notice dated 9th May, 2016 and therefore the law applicable was Section 8 of the Law Reform Act, Cap 8 which states that:

“8.1. The High Court shall whether in exercise of its civil or criminal jurisdiction issue any of the prerogative writs of mandamus, prohibition or certiorari.

2. In any case in which the High Court in England is by virtue of the Provision of Section 7 of the Administration of Justice (miscellaneous provision) Act 1983 of the UK empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order”

10. Mr. Khatib submitted that an order of injunction cannot be issued based on a Judicial Review as the only remedies/order available are certiorari, mandamus and prohibition. Counsel referred the Court to the case of **Republic versus District Land Registrar & Another Ex Parte Kiprono Tegerei & Another [2005] eKLR** and further the case of **Western College of Arts and Applied Science versus Oranga and Others [1976]** as quoted in **Cortec Mining Ltd versus Cabinet Secretary, AG & Others [2015] eKLR** where it was held:

“The High Court has no jurisdiction to order a temporary injunction pending appeal in Judicial Review Proceedings.”

11. Counsel submitted the Applicants have moved this Court to issue the injunction in terms of Order 42 Rule 6 which applies to civil proceedings and not Judicial Review proceedings. Counsel further submitted that Order 42 Rule 6 cannot override the provision of the Law Reform Act thus this court lacks the jurisdiction to grant an order of stay.

12. Mr. Khatib submitted that substantial loss will not be occasioned on the Applicants as substantial loss can only result where there is an order to be executed and that in this instant case there is no order to be executed apart from the award of costs. Counsel submitted that there was no imminent danger of eviction of the Applicants as the ex-parte Applicant/Respondent has to file eviction proceedings first which have to be heard and determined.

13. Mr. Khatib submitted that the appeal will not be rendered nugatory if it succeeds because if eviction will have been effected the same can be dealt with by way of an Order of Reinstatement and urged this court to dismiss the application.

14. Mr. Siminyu, counsel for the Interested Parties/Applicants submitted that the correct issue for determination by this court is **“whether this Court has the jurisdiction to grant stay of execution emanating from a ruling under Judicial Review proceedings”** and not as stated by Mr. Khatib as there is a distinction between an injunction and stay where the former is a legal remedy that is intended to stop an act while the latter is intended to suspend or put in abeyance the effect of a decision already pronounced. Counsel submitted that the Applicants were praying for an order of stay and not an injunction.

15. Mr. Siminyu submitted that Section 8 (1) and (2) which were relied on by Mr. Khatib were irrelevant to the issue of stay and that sub-section 5 of Section 8 of the Law Reform Act expressly allows appeal from a decision of the High Court made in the exercise of its civil jurisdiction and that no provision of the Law Reform act takes away the discretion of this Court to issue a stay.

16. Mr. Siminyu submitted that Rule 41 of the Court of Appeal Rules, 2010 recognizes that the High Court has original jurisdiction in matters of stay pending appeal to the Court of Appeal even though it allows the Court of Appeal to deal with such matters. Counsel submitted that Order 53 Rule 1(4) of the Civil Procedure Rules, 2010 gives this Court unfettered discretion on matters of stay.

17. Mr. Siminyu submitted that the case cited by the ex-parte Applicant/Respondent, **Cortec Mining Case**, was distinguishable as it dealt with the issue of injunction as opposed to stay. Counsel submitted that **Cortec Mining (K) Ltd** moved the court by way of Judicial Review which was dismissed. It then appealed to the Court of Appeal and filed an application for injunction pending appeal and that the argument that arose from the Preliminary Objection to the said application was whether the Court of Appeal had powers to grant a remedy which the superior Court had no power to grant. Counsel further submitted that the Court of Appeal upheld the Preliminary Objection and struck out the application on the basis that the Court of Appeal cannot grant a remedy which the High Court has no powers to grant. Counsel submitted that the issue of stay never arose in the said case.

18. Mr. Siminyu submitted that Judicial Review Proceedings are *Sui Generis* thus this court has the jurisdiction to deal with matters arising from Judicial Review proceedings. Counsel submitted that if the order sought is not granted the Applicants will definitely be evicted and that the order will preserve and maintain the tenancy interest between the parties pending determination of the appeal.

19. Mr. Siminyu submitted that the appeal could be rendered nugatory if the order sought is not granted because eviction will be effected and the only remedy that will be available to the Applicants will be reinstatement which will create a new cause of action. Counsel submitted that the appeal was arguable as it will deal with the issue of what constitutes a controlled tenancy under Section 2 of the Landlord Tenant Act (Shops, hotels and catering establishments), Cap 301, Laws of Kenya and urged this court to allow the application.

Determination

20. Having carefully analyzed the application, I find that the issue for determination by this court is **whether this court can grant stay of execution of the ruling and orders issued on 23rd February, 2017 in Judicial Review No. 23 of 2016 pending the hearing and determination of the intended appeal.**

21. The genesis of the application is an injunction order issued by the **Business Rent Tribunal in Case No. 18/2016** restraining the ex-parte applicant/respondent herein from evicting, harassing or in any way interfering with the Interested Parties/Applicants quiet enjoyment of the tenancy in the suit premises. The ex-parte Applicant/Respondent then approached the High Court in this matter seeking Judicial Review orders of certiorari and prohibition which were granted vide a ruling dated 23rd February, 2017 in essence quashing the proceedings and order of the Business Tribunal and prohibiting the Tribunal from further hearing **BPRTC No. 18 of 2016**. The Interested Parties/Applicants are now seeking a stay of execution of the orders issued on 23rd February, 2017 pending the hearing and determination of their appeal.

22. Learned Counsel Mr. Khatib for the ex-parte applicant/respondent submitted that by virtue of section 8 (1) and (2) of the Law Reform Act, Cap 26, Laws of Kenya, this Court has no jurisdiction to issue a stay or injunction of a Ruling emanating from judicial review proceedings and submitted that the court is only restricted to the orders of mandamus, prohibition and certiorari. I am of the view that this is not the position, in the case of **Nakumatt Holdings Limited versus Commissioner of Value added Tax [2011]**, the court held the superior court in the matter before the court has the residual power to correct its own mistake. This in essence means that this court can issue other orders except the prerogative writs mentioned above.

23. Learned Counsel Mr. Siminyu for the Interested Parties/Applicants herein submitted that the Applicants were seeking an order of stay of execution and not an injunction as submitted by learned counsel Mr. Khatib. Mr. Siminyu then distinguished the case of **Cortec Mining [supra]** cited by Mr. Khatib by submitting that the court in that case dismissed the application for an injunction and not a stay

of execution. Therefore, the court will now consider whether an order of stay of execution can be issued by this court in respect of a matter arising out of Judicial Review proceedings.

24. In the case of **Republic versus University of Nairobi, Civil Application No. Nairobi 73 of 2001 (CAK) [2002] 2 EA 572**, the Court of Appeal granted a stay in respect of a matter that arose from a Judicial Review application. Similarly, in the case of **Republic Versus The Commissioner for Investigations and Enforcement Ex-Parte Wananchi Group Kenya Limited [2014]** Odunga J. stated that:

“It is therefore my view that where the order being appealed from is capable of being executed over and above the order of costs, stay of execution may be granted”.

25. Judicial Review Proceedings herein resulted in the issuance of two orders over and above the order of costs:

“a) An order of certiorari is hereby issued to bring into this court and quash the proceedings and order of the chairman Business Premises Rent Tribunal made on 29th February, 2016 in BPRT case NO. 18 of 2016, Khalif Jele Mohamed and Salat Hussein versus Abdulkadir Hubess.

b) That an order of prohibition is hereby issued to prohibit the respondent from proceeding further with the hearing of BPRTC No. 18 of 2016, Khalif Jele Mohamed and Salat Hussein versus Abdulkadir Hubess.

c) The Interested Parties herein shall pay the costs of this application”.

26. The aforementioned orders were positive unlike in the case of **Stanbic Bank Kenya Ltd versus Kenya Revenue Authority, Civil Appeal No. 294 of 2007** where the court held that:

“All that the superior court did after hearing the notice of motion was to dismiss the motion with costs to the respondent. Other than an order of costs, the superior court order was negative and could only be executed by either party. That being the case, there is no order the execution of which this court can stay as the superior court did not order any party to do anything or to refrain from doing anything that this court can stay....”

Thus in my view the orders issued in the Ruling delivered on 23rd February, 2017 are capable of execution.

27. Having established that the orders are positive and capable of stay of execution the issue that now arises is whether the Applicants herein are deserving of the order of execution. Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides that no order for stay of execution shall be made unless:

a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay.

b) Such security as the court orders for the due performance of such decree or orders as may ultimately be binding on him has been given by the applicant.

28. The Applicants herein submitted that they would suffer substantial loss if the orders sought are not granted. However, they did not furnish this court with any evidence to substantiate their claim, for example, statements to show loss of business income. The Applicants also indicated that the appeal would be rendered nugatory if it succeeds and their orders are not granted. However, the ex-parte Applicant/Respondent submitted that if he executes the orders and evicts the Applicants and the Applicants succeed in their appeal then the Applicants can apply for an order of reinstatement. The Applicants did not show how they would be prejudiced if they had to apply for an order of reinstatement if the appeal succeeds. Therefore, I find that the Applicants have not satisfied this court that they will

suffer substantial loss if the order for stay of execution is not granted.

29. For the foregoing reasons, I dismiss the application dated 9th March 2017.

30. Costs to the ex-parte Applicant/Respondent.

Dated, Signed and Delivered in Mombasa this 27th day of July, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Odongo holding brief Siminyu for Interested Parties

M/S Wambani holding brief Khatib for Ex parte Applicant

Mr. Mwanjeja holding brief Makuto for Respondent

Mr. Kaunda Court Assistant